

STATE OF INDIANA



INDIANA UTILITY REGULATORY COMMISSION
302 W. WASHINGTON STREET, SUITE E-306
INDIANAPOLIS, INDIANA 46204-2764

<http://www.state.in.us/iurc/>
Office: (317) 232-2701
Facsimile: (317) 232-6758

IN THE MATTER OF THE INDIANA)
UTILITY REGULATORY COMMISSION'S)
INVESTIGATION OF MATTERS)
RELATED TO THE FEDERAL)
COMMUNICATIONS COMMISSION'S)
REPORT AND ORDER AND ORDER ON)
REMAND AND FURTHER NOTICE OF)
PROPOSED RULEMAKING IN CC)
DOCKET NOS. 01-338, 96-98, AND 98-147)

CAUSE NOS. 42500,
42500-S1 and 42500-S2

FILED

MAR 26 2004

INDIANA UTILITY
REGULATORY COMMISSION

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

On August 21, 2003, the Federal Communications Commission ("FCC") issued its long-awaited Triennial Review Order ("TRO"). A major component of the TRO was delegation to states of the responsibility to make impairment determinations as to mass market switching, high capacity loops and transport, and to establish a batch hot cut process. The FCC imposed a short deadline of nine months after the TRO's effective date of October 2, 2003, for states to complete these delegated tasks. This Commission established these Causes and an aggressive procedural schedule to timely complete its obligations under the TRO by the July 2, 2004 deadline. To date, the Commission has received most of the parties' voluminous prefiled testimony and exhibits. Evidentiary Hearings on impairment of mass market switching, and high capacity loops and transport, and the establishment of a batch hot cut process are all scheduled to commence and conclude in April.

On March 2, 2004, the United States Court of Appeals for the D. C. Circuit issued an order that vacated major portions of the TRO, including the FCC's delegation to states to make impairment determinations. However, the Court stayed its vacatur for at least sixty days. Since that time there have been numerous and diverse opinions as to whether states should continue or delay their TRO proceedings, with apparently more states than not having decided to stay their proceedings at least until a clearer picture emerges as what impact the D.C. Circuit decision will have on states' participation in the TRO process.

With so much uncertainty and speculation among states immediately after the D.C. Circuit decision, we had an obligation, particularly to the parties to these proceedings, to speak quickly and as clearly as possible on our position to delay or move forward. On March 4, 2004 we issued a Docket Entry that stated our intention to not delay our TRO proceedings, but also recognized our willingness to continue to evaluate

relevant information so as to not unnecessarily direct state or party resources toward goals that may substantially change or be eliminated.

On March 11, 2004, Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana ("SBC Indiana") filed its *Motion to Temporarily Stay All Triennial Review Proceedings* ("Motion"). Our March 12, 2004 Docket Entry condensed the time periods found in 170 IAC 1-1.1-12 for responding and replying to motions and directed that any responses to the Motion should be filed by March 17, 2004, and that any reply by SBC Indiana should be filed by March 19, 2004. On March 17, 2004, WorldCom, Inc. d/b/a MCI, McLeodUSA Telecommunications Services, Inc., Sage Telecom, Inc., Talk America, Inc., Z-Tel Communications, Inc., AT&T Communications of Indiana, GP, TCG Indianapolis, and Covad Communications Company filed responses to the Motion. On March 19, 2004, SBC Indiana filed its reply to the responses.

The Motion asks for a reevaluation of the decision in the March 4, 2004 Entry and requests a temporary stay of these proceedings until the later of the denial of any petition for rehearing or rehearing en banc or until sixty days from March 2, 2004, and a request to schedule a status hearing to be held in 60-90 days to consider further steps. SBC Indiana contends that it would be "wasteful and imprudent" for the Commission and the parties to continue these proceedings in light of a judicial decision that will require the FCC to develop new unbundling rules. SBC Indiana also downplays the significance of the Court's stay of its vacatur, citing to several federal decisions, including *Chambers v. United States*, 22 F.3d 939 (9th Cir. 1994) and *Yong v. INS*, 208 F.3d 1116 (9th Cir. 2000), for the principle that the D.C. Circuit decision to reject major portions of the TRO constitutes binding authority from the day it was issued.

In their various responses to the Motion, the competitive local exchange carriers ("CLECs") contend that a delay of these proceedings would render already-expended resources "wasteful and imprudent." The CLECs also claim that because of the Court's stay, nothing has yet changed under the TRO; that further stays of the Court's decision are likely; that failure to develop an evidentiary record will "marginalize" the Commission with respect to future FCC unbundling decisions; and that the Commission should continue to develop a factual record.

Given the D.C. Circuit decision, some goals of the TRO may undoubtedly change or be eliminated. However, some states, like Indiana, have thus far chosen to move forward with their TRO proceedings because it is not clear that a major interruption in these major proceedings is the more reasoned reaction to the Court's decision. Part of the dilemma for states derives from the Court's decision to stay the effectiveness of its order. While the cases cited by SBC Indiana support the position that the D.C. Circuit decision constitutes binding authority from the point of issuance, an important part of the D.C. Circuit decision is that the Court has stayed the effectiveness of its own ruling for at least sixty days. Therefore, the fact remains that the Court's determinations to vacate portions of the TRO are not yet effective, and most likely will not be effective before the Evidentiary Hearings in these Causes are scheduled to conclude. In light of the impact of the Court's decision on the TRO, it is a reasonable argument that SBC Indiana makes to

assume the FCC would be understanding of a state's decision to delay its TRO proceedings beyond the July 2, 2004 deadline. But what is also an obvious issue upon which we can only surmise, is why the FCC has not spoken in a unified voice to give procedural direction with respect to states' ongoing TRO proceedings. Therefore, it is a likewise reasonable assumption that the FCC expects states to press forward.

Another reason we continue to lean toward not delaying these proceedings is that the Commission has functioned and can continue to function as a finder of fact. Clearly, the Court of Appeals had no problem with states acting in a pure fact-finding role. The issues we are addressing in these proceedings are major issues related to establishing and maintaining competition, which will continue to be both a federal and state goal. It is reasonable to assume that even if the D.C. Circuit decision remains unaltered these same major competition-related issues are likely to resurface in some forum with states once again acting as fact-finders. With so many resources having already been expended, it may be more prudent to continue uninterrupted toward the completion of a comprehensive factual record.

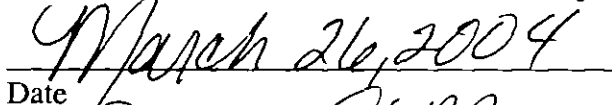
Having considered all of the parties' arguments, we continue to find that moving forward in these Causes, without clear direction to do otherwise, is the more reasoned alternative. Even if the D.C. Circuit decision remains unchanged we do not think that having a complete record on all of these major competition-related issues will be without value. Given the large amount of resources expended and evidence gathered even before the D.C. Circuit decision, we think the most complete and useful record, either in the current TRO context, in a future TRO context, or in any other context, will be one that is developed through an uninterrupted continuation of the existing momentum. As we stated in our March 4, 2004 Entry, we will continue to monitor and consider all new information relevant to this decision to move forward.

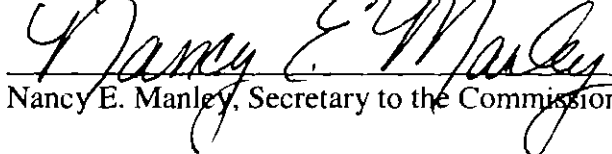
SBC Indiana's *Motion to Stay All Triennial Review Proceedings*, which was filed in these Causes on March 11, 2004, is hereby denied.

IT IS SO ORDERED.


Judith G. Ripley, Commissioner


William G. Divine, Administrative Law Judge


Date


Nancy E. Manley, Secretary to the Commission